

1 GEORGE GASCÓN
2 District Attorney
3 State Bar No. 182345
4 Omid Talai
5 Assistant District Attorney
6 State Bar No. 252131
7 850 Bryant Street, Suite 322
8 San Francisco, California 94103
9 Telephone: (415) 553-1754
10 Email: omid.talai@sfgov.org
11 Fax: (415) 575-8815

ENDORSED
FILED
San Francisco County Superior Court
JUN 10 2019
CLERK OF THE COURT
RON ROSS
BY: Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10 PEOPLE OF THE STATE OF CALIFORNIA,
11

Court No. 19008917 & 19008914

12 Plaintiff,

13 vs.

**NOTICE OF MOTION AND
MOTION TO DETAIN WITHOUT
BAIL (Cal. Const., art. I, §§ 12, 28)**

14 DOUGLAS JAMES LOMAS,
15 STEPHANIE CHING

16 ALSO KNOWN AS
17 STEPHANIE LOMAS

18 Defendants.

Date: June 10, 2019
Time: 1:30pm
Dept.: 9

19 TO THE HONORABLE COURT AND DEFENDANTS, BY AND THROUGH HIS
20 ATTORNEY:

21 PLEASE TAKE NOTICE that on June 10, 2019 at 1:30pm, or as soon thereafter as
22 counsel may be heard in Department 9 of the above-entitled court, located at 850 Bryant
23 Street, San Francisco, California, 94103, the People of the State of California will move to
24 detain Defendants without bail under the California Constitution.

25 This motion will be based on this notice of motion, on the following memorandum
26 of points and authorities, and on any exhibits lodged or filed with the Court, on such
27 supplemental memoranda of points and authorities as may hereafter be filed with the Court
28 or stated orally at the conclusion of the hearing on the motion, on all the papers and
records on file in this action, and on such oral and documentary evidence as may be

1 presented at the hearing of the motion.

2 Dated: June 10, 2019

3
4 
5 Omid Talai
6 Assistant District Attorney

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **INTRODUCTION**

9 This Court may detain Defendant without bail under the following provisions:

10 Article I, section 12

- 11 ☒ Felony offense involving violence;
12 ☐ Felony sexual assault;
13 ☐ Felony offense where the defendant threatened another with great bodily harm.

14 Article I, section 28

- 15 ☒ Felony offense causing victims to suffer direct, or threatened physical, psychological, or financial harm;
16 ☒ Felony offense where the defendant poses a serious danger to the safety of the victim or public safety;
17 ☒ Felony offense where the defendant poses a serious flight risk.

18 **STATEMENT OF THE CASE**

19 In summary, the charging documents allege that the Defendants committed the following substantive felony offense: 1 count of Murder for each Defendant.

20 **STATEMENT OF THE FACTS OF THE MURDER**

21 Defendants Ching and Lomas moved into Victim Benedict Ching's home at 161 Del Monte Street San Francisco, California in February 2019. Defendants lived in Mr. Ching's home with Mr. Ching and their two young children.

22 Police investigation, including video surveillance and photographic evidence, has documented the following events that took place between May 15, 2019 and May 20, 2019:

23 On May 15, 2019 Mr. Ching did not report to his job and was unreachable by phone. Witnesses report that this behavior was unusual and uncharacteristic of Mr. Ching.

24 At approximately 2:30 p.m. on May 19, 2019, Mr. Ching's employer, William Stei-

1 ner, and sister, Lilia Ching, went to Mr. Ching's residence to check on his wellbeing. Mr.
2 Steiner knocked at the front door of the residence and was met by a man he identified to
3 law enforcement as Defendant Lomas. Defendant Lomas only cracked the door slightly
4 ajar to address Mr. Steiner, telling Mr. Steiner that the family had all become ill. Defend-
5 ant Lomas also informed Mr. Steiner that Mr. Ching had left earlier that day, although Mr.
6 Steiner noticed Mr. Ching's vehicle parked in front of his residence. Defendant Lomas ab-
7 ruptly shut the front door and refused to allow Mr. Steiner or Ms. L. Ching to enter. After
8 Mr. Steiner and Ms. L. Ching left the residence, they each attempted to contact Mr. Ching
9 and Defendant Ching with no success. Video surveillance obtained from a neighbor's se-
10 curity camera confirms that Defendant Lomas' vehicle was present in front of Mr. Ching's
11 home on May 19, 2019, as well as two people matching descriptions of Defendants Ching
12 and Lomas.

13 Police were called to conduct a welfare check on Mr. Ching at his residence on May
14 20, 2019. Officer Aguirre arrived on-scene and met Ms. L. Ching, who had a key to Mr.
15 Ching's residence. Officer Aguirre used Ms. L. Ching's key to enter the residence through
16 the front door. The home was observed as unkempt and suspiciously messier than Mr.
17 Ching usually kept it. Officer Aguirre also observed a large cardboard blockade at the en-
18 trance to the kitchen, which needed to be moved in order to access that area of the home.
19 Officer Aguirre entered the bathroom and observed cardboard and plastic lining the walls
20 and bathtub, an unknown red liquid and circular saw inside the bathtub, and unknown bio-
21 logical matter in the open toilet bowl. Mr. Ching was not found inside the residence. Ms.
22 L. Ching informed Officer Aguirre she wished to file a missing person's report.

23 Officer Aguirre contacted Sergeant Tam, who later obtained a search warrant for
24 Mr. Ching's residence. During the authorized search on May 20, 2019, CSI personnel
25 found human body parts, including a severed head, inside the refrigerator. Traces of human
26 blood were identified inside the bathtub and on the circular saw. Medical Examiner's Of-
27 fice Investigators conducted a walk-through of the residence with Sergeant McWilliams,
28 during which additional plastic sheeting, rolls of duct tape, latex gloves, and other tools
were observed. Investigators declared the incident to be a homicide.

1 Early that morning at approximately 2:00 a.m. on May 20, 2019, Defendants Ching
2 and Lomas, along with their two children, boarded a flight bound for China. After fleeing
3 and upon their arrival in China they were arrested and returned to the United States.

4 REQUEST FOR JUDICIAL NOTICE

5 The People request that this Court take judicial notice of the statutes listed in the
6 charging documents and court records offered as exhibits. (Cal. Evid. Code §§ 451, subd.
7 (a), 452, subd. (d). The People notice their intent to request that this Court take judicial
8 notice of the court records attached as exhibits to this motion. (Cal. Evid. Code § 453.)

9 ARGUMENT

10 I. DETENTION WITHOUT BAIL IS WARRANTED UNDER ARTICLE I, SECTION 12.

11 Article I, section 12, subdivision (b) allows a court to detain a person without bail
12 for felony offenses involving violence or felony sexual assault “when the facts are evident
13 or the presumption great and the court finds based on clear and convincing evidence that
14 there is a substantial likelihood the person’s release would result in great bodily harm to
15 others[.]” (Cal. Const., art. I, § 12, subd. (b).) Article I, section 12, subdivision (c) allows a
16 court to detain a person without bail for “[f]elony offenses when the facts are evident and
17 the presumption great and the court finds by clear and convincing evidence that the person
18 has threatened another with great bodily harm and that there is a substantial likelihood that
19 the person would carry out the threat if released.” (Cal. Const., art. I, § 12, subd. (c).)

20 In *White*, the complaint charged the defendant with attempted kidnapping to commit
21 rape [Pen. Code § 209], assault with intent to commit rape [Pen. Code § 220], contact with
22 a minor to commit a sexual offense [Pen. Code § 288.3], and false imprisonment [Pen.
23 Code § 236]. (*In re White* (2018) 21 Cal.App.5th 18 review granted May 23, 2018.)¹ The
24 court in *White* concluded that the defendant was highly dangerous, even as an aider and
25 abettor, because he encouraged and planned a deliberate attack that occurred during the
26

27
28 ¹ (Cal. Rules of Court, rule 8.1115(e)(1) [pending review with the Supreme Court, a
published opinion of the Court of Appeal in the matter has no binding or precedential
effect, but may be cited for potentially persuasive value].)

1 day on a heavily trafficked street, targeting a vulnerable stranger. The defendant also
2 worked in concert with the co-defendant “to increase the odd of the attack’s success.” (*Id.*
3 at p. 30.) Although the co-defendant had not completed the attack, the court of appeal ruled
4 that the trial court reasonably inferred that the defendant knew that the co-defendant
5 intended to rape the victim, “a devastatingly harmful injury[.]” (*Id.*) The court
6 acknowledged that the defendant did not have a criminal record, denied the allegations
7 during interviews with the police, and that no great bodily injury had been inflicted. (*Id.*)
8 Yet, based on the circumstances of the case, the *White* court concluded that the trial court
9 could reasonably find that the defendant “acted so brazenly, so inexplicably, and so
10 without regard for the laws and norms of society that there would be a substantial
11 likelihood that his release would result in great bodily harm to others.” (*Id.* at p. 31.)
12 Thus, the *White* court concluded that sufficient evidence supported the trial court’s
13 detention order. (*Id.*)

14 Here, as in *White*, the two co-defendants have exhibited a complete disregard for
15 the “norms of society,” as exhibited in their ruthless killing and dismemberment of Mr.
16 Ching. The circumstances of the present case indicate that both Defendant Ching and
17 Defendant Lomas are capable of inflicting excessive means of bodily harm, or of aiding in
18 the process. The body parts found in the refrigerator are a prime indicator of their disregard
19 for human life. Further, the defendants exhibited no remorse or concern for the death of the
20 victim, and hastily fled to China as family members began to question the victim’s
21 whereabouts. This evidence shows that both Defendant Ching and Defendant Lomas
22 should be detained.

23 **II. DETENTION IS ALSO WARRANTED UNDER ARTICLE I, SECTION 28.**

24 Before 2008, section 12 provided the sole means to preventatively detain a defendant
25 before trial. That landscape changed, however, with the enactment of Marsy’s Law under
26 Proposition 9 in 2008. Currently, both sections 12 and 28, as reconciled, provide the means
27 to deny bail in noncapital cases and preventatively detain those defendants that pose
28 serious safety risks.

A. California’s Provisions for Pretrial Detention

1 Understanding California's current pretrial detention landscape requires a review of
2 both the text of the applicable constitutional and statutory provisions and the historical
3 backdrop against which they were enacted. (*Cal. Redevelopment Ass'n v. Matosantos*
4 (2011) 53 Cal.4th 231, 265 (*Matosantos*).)

5 1. 1982 Election: Competing Bail and Detention Provisions

6 In 1982, the ballot provided voters with two competing provisions regarding
7 detention and bail, namely Proposition 4, which addressed section 12, and Proposition 8,
8 which addressed section 28 of the California Constitution.

9 Initially, section 12 provided that all persons shall be released on bail, excepting
10 *capital* crimes when the facts are evident and the presumption great. Proposition 4 sought
11 to expand detention to *noncapital* cases to include felony offenses involving acts of
12 violence and felony offenses where the defendant threatened another with great bodily
13 harm. (Ballot Pamp., Primary Elec., (June 8, 1982) text of Prop. 4, p. 17 (1982 Ballot
14 Pamp. Prop. 4); Cal. Const., art. I, § 12, subds. (b) & (c).) (Section 12 was later amended
15 in 1994 to include felony sexual offenses.)

16 Proposition 8, on the other hand, sought to enact "comprehensive provisions and
17 laws" and "safeguards in the criminal justice system" to fully protect the rights of victims
18 of crime, as "a matter of grave statewide concern." (Ballot Pamp., Primary Elec., (June 8,
19 1982) text of Prop. 8, p. 33 (1982 Ballot Pamp. Prop. 8).) Proposition 8 also specifically
20 sought to provide courts with broader discretion to preventatively detain those persons who
21 pose a serious danger to public safety (*italics for additions and underline for emphasis*):

22 *The rights of victims pervade the criminal justice system, encompassing*
23 *not only the right to restitution from the wrongdoers for financial losses*
24 *suffered as a result of criminal acts, but also the more basic expectation that*
25 *persons who commit felonious acts causing injury to innocent victims will be*
26 *appropriately detained in custody, tried by the courts, and sufficiently punished*
27 *so that the public safety is protected and encouraged as a goal of highest*
28 *importance.*

(1982 Ballot Pamp. Prop. 8, *supra*, p. 33.) Proposition 8 would have also provided
a tool "to stop extremely dangerous offenders from being released on bail to
commit more violent crimes." (1982 Ballot Pamp. Prop. 8, *supra*, p. 34.)

1 Proposition 8 therefore supplanted flight risk with public safety as the primary
2 consideration in denying bail. Lastly, Proposition 8 expressly sought to repeal
3 section 12. (1982 Ballot Pamp. Prop. 8, *supra*, p. 33.)

4 2. Amendment by the Legislature

5 Following the 1982 election, the Legislature amended Penal Code section 1275 in
6 1987 to mirror the bail-related provisions of Proposition 8. The amendment to section
7 1275 also included mandatory factors to consider in assessing the seriousness of the
8 offense charged, including injury to the victim, threats made to the victim or witnesses,
9 and the use of a firearm or other deadly weapon.

10 The 1987 amendments to section 1275 were drawn verbatim from the “Public
11 Safety Bail” provisions of Proposition 8. (Conc. Sen. Amend. to Assem. Bill No. 630
12 (1987-1988 Reg. Sess.) Aug. 27, 1987.) According to the author of the bill to amend
13 section 1275, the amendment “codifie[d] existing provisions of the Victim’s Bill of Rights
14 which provide that public safety shall be the primary consideration in regard to bail” and
15 noted that the United States Supreme Court upheld public safety as “a valid basis upon
16 which to set or *deny* bail.” (Rep. Larry Sterling, sponsor of Assem. Bill No. 630 (1987-
17 1988 Reg. Sess.) letter to Governor, Sep. 3, 1987 (*italics added*).) Presumably, the author
18 referred to the United States Supreme Court decision in *United States v. Salerno* (1987)
19 481 U.S. 739, which upheld federal public safety detention provisions under the Bail
20 Reform Act of 1984 against the defendant’s due process challenge. (481 U.S. at pp. 741,
21 748, 749, 752.)

22 3. Bail and Detention Provisions of Section 12 Prevail Over Those 23 Contained in Section 28

24 Following the 1982 election and the Legislature’s amendment to section 1275,
25 courts assessed the two competing constitutional provisions—one which sought to repeal
26 the other—enacted in the same election. Ultimately, the Court held that the bail and
27 detention provisions of section 12 prevailed over those contained in section 28 because
28 section 12 received more votes. (*People v. Standish* (2006) 38 Cal.4th 858, 876-878

1 (*Standish*); *York, supra*, 9 Cal.4th at p. 1140, fn. 4; see also Cal. Const., art. XVIII, § 4; see
2 also *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255 (*Brosnahan*).)

3 *Standish*, more so than *York*, conducted a “section-by-section” comparison between
4 sections 12 and 28 and concluded that a direct conflict existed. (*Standish, supra*, 38
5 Cal.4th at pp. 877-878.) First and foremost, section 28 sought to repeal section 12
6 outright. (*Id.* at p. 877.) Section 28 would have also prohibited own recognizance release
7 for any serious felony, while section 12 left intact a court’s discretion to grant release for
8 all offenses. (*Id.* at p. 877.) Last, section 12 stated that all persons, subject to limitations,
9 “shall” be admitted to bail, while section 28 provided courts with discretion to release
10 persons on bail in all cases subject to enumerated factors. (See *id.*) Because the provisions
11 contained competing measures related to bail, release, and detention and section 12
12 received more votes than section 28, the Court concluded that the bail provisions of section
13 28 did not take effect. (*Id.* at pp. 877-878.)

14 In his dissent, Justice Chin identified how the 1982 amendments changed section
15 12. (*Standish, supra*, 38 Cal.4th at pp. 888, 892-893 (conc. & dis. opn. of Chin, J.)) Prior
16 to 1982, section 12 “gave a defendant an absolute right to bail in noncapital cases and gave
17 no discretion to the court to deny bail, even where public safety was at stake.” (*Id.* at p.
18 893 (*italics in original*)). The amendment to section 12, however, ““broaden[ed] the
19 circumstances under which courts may deny bail[]” and provided ““judges with a
20 necessary legal tool to protect the public from repeat violent offenders.”” (*Id.* at p. 892
21 quoting 1982 Ballot Pamp. Prop. 4, *supra*, pp. 16, 18.) Thus, section 12 allowed “courts to
22 deny release on bail in the interest of public safety[]” and placed “express public safety
23 limitations on the constitutional bail provision[.]” (*Standish, supra*, 38 Cal.4th at p. 892.)

24 4. 2008 Election: Marsy’s Law

25 The 2008 election presented quite a different scenario than the 1982 election had.
26 Unlike 1982, the 2008 ballot contained just one provision related to bail and detention:
27 Proposition 9, also known as the “Victim’s Bill of Rights Act of 2008: Marsy’s Law.”
28 (Ballot Pamp., Gen. Elec., (Nov. 4, 2008) text of Prop. 9, p. 128 (2008 Ballot Pamp. Prop.

1 9.) Proposition 9 added to section 28 that “[c]riminal activity has a serious impact on the
2 citizens of California. The rights of victims of crime and their families in criminal
3 prosecutions are a subject of grave statewide concern.” (2008 Ballot Pamp. Prop. 9, *supra*,
4 p. 129.) As to the findings to support the amendments, section 28 stated (with italics for
5 additions and strike-throughs for deletions):

6 *Victims of crime are entitled to have the criminal justice system view*
7 *criminal acts as serious threats to the safety and welfare of the people of*
8 *California. ~~that the~~ The enactment of comprehensive provisions and laws*
9 *ensuring a bill of rights for victims of crime, including safeguards in the*
10 *criminal justice system ~~to fully protect~~ protecting those rights and ensuring that*
11 *crime victims are treated with respect and dignity, is a matter of grave*
12 *statewide concern high public importance. California’s victims of crime are*
13 *largely dependent upon the proper functioning of government, upon the*
14 *criminal justice system and upon the expeditious enforcement of the rights of*
15 *victims of crime described herein, in order to protect the public safety and to*
16 *secure justice when public safety has been compromised by criminal activity.*

17 (2008 Ballot Pamp. Prop. 9, *supra*, p. 129 [text of proposed law]; Cal. Const., art. I, § 28,
18 subd. (a)(2).) The amendment also broadened enforceable rights to

19 *encompass the expectation shared with all of the people of California that*
20 *persons who commit felonious acts causing injury to innocent victims will be*
21 *appropriately and thoroughly investigated, appropriately detained in custody,*
22 *brought before the courts of California even if arrested outside the State, tried*
23 *by the courts in a timely manner, sentenced, and sufficiently punished so that*
24 *the public safety is protected and encouraged as a goal of highest importance.*

25 (2008 Ballot Pamp. Prop. 9, *supra*, p. 129; Cal. Const., art. I, § 28, subd. (a)(4).)

26 Proposition 9 further amended the public safety subdivision to add “the safety of the
27 victim” as an additional, but primary consideration in “setting, reducing, or denying
28 bail[.]” (2008 Ballot Pamp. Prop. 9, *supra*, p. 130.) As to own recognizance release, the
amendment to section 28 removed the language that prohibited release for a person
charged with a serious felony. (2008 Ballot Pamp. Prop. 9, *supra*, p. 130.)

The impetus for Proposition 9 was a young woman named Marsy Nicholas, who
was murdered by her former boyfriend. Proposition 9 noted that the family was shocked to
encounter the defendant after his arrest, later “learning that he had been *released on bail*
without any notice to Marsy’s family and *without any opportunity for her family to state*

1 *their opposition to his release.*” (2008 Ballot Pamp. Prop. 9, *supra*, p. 129, § 2 (italics
2 added).) Proposition 9 also sought to enforce those rights—including public safety bail and
3 detention—that had not been enforced under 1982’s Proposition 8:

4 [T]he ‘broad reform’ of the criminal justice system intended to grant these
5 basic rights mandated in the Victims’ Bill of Rights initiative measure passed
6 by the electorate as Proposition 8 in 1982 had not occurred as envisioned by the
7 people. Victims of crime continue to be denied rights to justice and due
8 process.

(2008 Ballot Pamp. Prop. 9, *supra*, p. 128, § 2.)

9 **B. Section 28 Can Be Reconciled with Section 12 to Provide Additional**
10 **Exceptions to the General Right to Bail and Provides Courts with the**
11 **Discretion to Detain Those Individuals Who Pose a Serious Safety or**
12 **Flight Risk**

13 Although sections 12 and 28 directly conflicted when the electorate initially passed
14 them in 1982, the 2008 amendment to section 28 presented a considerably different
15 scenario, which permits reconciliation. Ultimately, both provisions delineate exceptions to
16 the general rule providing for bail and own recognizance release and permit courts to
17 preventatively detain those defendants that pose serious safety risks.

18 The presumption against implied repeal requires courts “‘to maintain the integrity
19 of both [enactments] if they may stand together.’” (*Lance W.*, *supra*, 37 Cal.3d at p. 887
20 quoting *Warne v. Harkness* (1963) 60 Cal.2d 579, 588.) Thus, when faced with two
21 provisions, an obligation rests with the courts “‘to reconcile conflicts between . . .
22 constitutional provisions to avoid implying that a later enacted provision repeals another
23 existing . . . provision.” (*Lance W.*, *supra*, 37 Cal.3d at p. 886.) In that vein, this Court
24 has emphasized the importance of harmonizing potentially inconsistent statutes and
25 making a finding of implied repeal “‘only where there is no rational basis for
26 harmonizing the two potentially conflicting statutes[.]’” (*State Dept. of Public Health v.*
27 *Superior Court* (2015) 60 Cal.4th 940, 955 (*State Dept. of Public Health*).) Foremost in
28 this analysis, a court must “ascertain the intent of the electorate” so as to “effectuate that
intent.” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 978-979 (*Arias*); *Lance W.*,
supra, 37 Cal.3d at p. 889.) Further, the initiative and referendum procedures—“one of the

1 most precious rights of our democratic process”—are drafted under the powers reserved by
2 the people. (*Brosnahan, supra*, 32 Cal.3d at p. 262.) As a result, courts jealously guard
3 this precious right and liberally construe the terms of an initiative, “resolving reasonable
4 doubts in favor of the people’s exercise of their reserved power.” (*Ibid.*)

5 How section 28 may be harmonized with section 12 depends, in part, upon the
6 canons of interpretation. “In interpreting the scope of [a] constitutional provision, [the
7 court applies] “the same principles that govern statutory construction,” beginning with
8 the text as the best indicator of intent.” (*Matosantos, supra*, 53 Cal.4th at p. 265; *People v.*
9 *Rizo* (2000) 22 Cal.4th 681, 685 [voter initiatives].) Courts must first look to the language
10 itself, “giving the words their ordinary meaning and construing this language in the context
11 of the statute and initiative as a whole.” (*People v. Superior Court (Pearson)* (2010) 48
12 Cal.4th 564, 571 (*Pearson*).) If the language is unambiguous, the inquiry ends, as courts
13 “presume the voters intended the meaning apparent from the language” itself. (*Pearson,*
14 *supra*, 48 Cal.4th at p. 571.) If, however, the text is ambiguous, courts look to extrinsic
15 aids to determine the voters’ intent. (*Matosantos, supra*, 53 Cal.4th at p. 265.) Extrinsic
16 aids may include the “historical backdrop against which the provision was drafted and
17 adopted” (*Matosantos, supra*, 53 Cal.4th at p. 265), ballot explanations by the Legislative
18 Analyst (*Lance W., supra*, 37 Cal.3d at p. 888), ballot summaries (*Pearson, supra*, 48
19 Cal.4th at p. 571), and pamphlet arguments (*People v. Floyd* (2003) 31 Cal.4th 179, 187).

20 Beginning with the text (*State Dept. of Public Health, supra*, 60 Cal.4th at p. 856),
21 section 28 expressly requires courts to consider the protection of the public and the safety
22 of the victim in “denying bail,” amongst other enumerated factors. Indeed, the text of
23 section 28 requires courts to make public safety and the safety of the victim their primary
24 considerations in deciding whether to deny bail. True, the 2008 amendment made a few
25 changes to the public safety subdivision itself. But, the amendment made significant
26 changes throughout section 28, including those directly preceding the public safety
27 subdivision. (Cal. Const., art. I, § 28, subd. (f).) Proposition 9 also presented these
28 amendments to the electorate as part of a logical and coherent whole and they could not be
understood without the remaining provisions. (*Raven v. Deukmejian* (1990) 52 Cal.3d

1 336, 349; *Pearson, supra*, 48 Cal.4th at p. 571; *Valencia, supra*, 3 Cal.5th 347 at p. 357.)

2 Ultimately, section 28, by its own words, permits court to deny bail in noncapital cases.

3 In reconciling the respective texts of sections 12 and 28, the exceptions under
4 section 12 would still exist, but they would not provide the exclusive means for a court to
5 deny bail in noncapital cases. Rather, courts could also look to section 28's exceptions. In
6 the context of detention, section 28 references those defendants who commit felonious acts
7 that cause injury to innocent victims, along with the specific need to protect public safety
8 as the chief goal. (Cal. Const., art. I, § 28, subd. (a)(4); *Salerno, supra*, 481 U.S. at pp.
9 747, 750.) Similarly, the public safety subdivision of section 28 designates victim and
10 public safety as the primary considerations in denying bail, which further indicates the
11 intent that section 28 applies to felony offenses where the defendant poses a serious danger
12 to the victim or public safety. (Cal. Const., art. I, § 28 subd. (f)(3).) As to felonious acts
13 causing injury to victims, section 28 limits those offenses to acts where the victim "suffers
14 direct or threatened physical, psychological, or financial harm as a result of the
15 commission or attempted commission of a crime or delinquent act." (Cal. Const., art I, §
16 28, subd. (e) [defining "victim"].) Finally, section 28 includes flight risk as one of the
17 factors to consider in denying bail. (Cal. Const., art. I, § 28, subd. (f)(3).) If a defendant
18 poses an unreasonable and unmanageable flight risk, but the court cannot detain that
19 defendant, the court cannot ensure an expeditious enforcement of the victim's rights or
20 honor the victim's right to a speedy trial. (See Cal. Const., art. I, § 28, subd. (a)(2).) In
21 sum, section 28 provides additional exceptions when a defendant is arrested for: 1)
22 felonious offenses causing victims to suffer direct or threatened physical, psychological, or
23 financial harm as the result of the commission or attempted commission of a crime or
24 delinquent act; 2) felonious offenses where the defendant poses a serious danger to the
25 safety of the victim or public safety; and 3) felonious offenses where the defendant poses a
26 serious flight risk. (Cal. Const., art. I, § 28, subds. (a)(4), (e) & (f)(3).)

27 Furthermore, the history behind section 12 itself confirms that sections 12 and 28 can
28 be reconciled in this manner. Prior to 1982, section 12 gave a defendant charged with a
noncapital offense the *absolute* right to bail. Section 12 thus gave no discretion to a court
to deny bail in noncapital cases. With the 1982 amendment, however, section 12 provided

1 “public safety limitations” on the general right to bail and bestowed some discretion on
2 courts, based on the factors added relative to public safety. (See *Standish, supra*, 38
3 Cal.4th at pp. 892-893 (dis. opn. of Chin, J.)) In 2008, the amendments to section 28 did
4 the same. While section 28 still used the word “may” as opposed to “shall,” the
5 amendment added further exceptions, subject to enumerated factors. So, section 28, as
6 amended, did not completely repeal the right to bail, but rather imposed public safety
7 limitations, just as section 12 had in 1982. Thus, both sections 12 and 28 provide courts
8 with the means to deny bail in noncapital cases when victim or public safety is at stake.

9 Moreover, the significant conflicts between sections 12 and 28 present in 1982 were
10 no longer present in 2008, making reconciliation possible when it had not been before. For
11 example, section 28 in 1982 specifically sought to repeal section 12, while the 2008
12 amendment to section 28 made no mention of repeal or section 12. In 1982, section 28
13 sought to prohibit courts from releasing defendants charged with serious felonies on their
14 own recognizance, while the amendment in 2008 removed that restrictive provision.
15 Instead, the amendment permitted release for all offenses, subject to the factors to be
16 considered in setting, reducing, or denying bail.

17 Aside from the text, the intent behind the amendment to section 28 shows the
18 electorate intended to furnish judges with additional means to detain persons who pose an
19 unmanageable safety risk to either the victim or the public. Indeed, the ballot arguments in
20 favor of Proposition 9 focused specifically on the concerns felt by the family of Marsy
21 Nicholas when they saw her murderer free on bail at a local grocery store. The argument
22 in favor of the proposition promised to prevent such events because judges would be
23 required to consider the victim’s safety and the safety of the victim’s family in making
24 release decisions. (2008 Ballot Pamp. Prop. 9, *supra*, p. 62; see also p. 129, § 2.) Under
25 this backdrop, Marsy’s Law sought to expand judicial authority to detain when necessary
26 to protect victims and the public. (See *Lance W., supra*, 37 Cal.3d at p. 887 [“The general
27 rule is that courts assume from a new enactment a purpose to change existing law.”].) By
28 bestowing this authority on the court, the amendment to section 28 provided an additional
and necessary tool to protect safety, as section 12 did in 1982. The 2008 amendment also
placed public safety limitations on the constitutional bail provision, but did not eliminate

1 that right entirely, just like section 12.

2 The timing of Proposition 9—two years after the Supreme Court’s decision in
3 *Standish*—further solidifies the electorate’s intent to reenact the bail and detention
4 provisions of Proposition 8 previously held inoperative by the Court. In fact, Marsy’s Law
5 sought to institute the broad reform that had not occurred as envisioned by the Victims’
6 Bill of Rights in 1982. (2008 Ballot Pamp. Prop. 9, *supra*, p. 128.) Of course, one of the
7 broad reforms that had not occurred in light of *Standish* was the modification to
8 California’s constitutional bail and detention provisions. “Although Marsy’s Law did not
9 directly address article I, section 12 of the Constitution, it did reenact, as section 28(f)(3),
10 Prop. 8’s provisions addressing bail and [own recognizance] release in nearly identical
11 form.” (Pretrial Detention Reform, *supra*, at p. 23.) Proposition 9 resurrected the dormant
12 bail and detention provisions of section 28 and they can be reconciled as set forth above.

13 **C. Section 28, as Enacted, Satisfies Due Process Under *Salerno* Because**
14 **Its Application Is Limited to Defendants Arrested for Serious**
15 **Offenses Where the Defendant Poses a Serious Safety or Flight Risk**

16 The preventative detention provisions of section 28 serve compelling, legitimate
17 regulatory interests, including preventing danger to the community and preventing future
18 criminal conduct by arrestees. (*Salerno, supra*, 481 U.S. at pp. 747, 749; *Schall, supra*,
19 467 U.S. at p. 264.) Such interests are plain not only from the language of amended
20 section 28, but from the contents of the ballot pamphlet. By its own words, section 28
21 places public safety and the safety of the victim above all other considerations when
22 denying bail and seeks to do so because criminal activity compromises public safety. (Cal.
23 Const., art. I, § 28, subds. (a)(2) & (f)(3).) Section 28 furthermore references the need to
24 protect public safety as the ultimate goal and the expectation that victim’s rights are to be
25 enforced expeditiously. (Cal. Const., art. I, § 28, subds. (a)(2) & (a)(4).) Additionally, the
26 report of the Legislative Analyst and the official arguments in favor of the proposition
27 show that the amendment to section 28 sought to empower victims by allowing them to
28 provide input in pre-trial release decisions, particularly for those defendants who pose a
serious danger to the community. (2008 Ballot Pamp. Prop. 9, *supra*, pp. 58-59, 62.)

Pretrial confinement under section 28 is also rationally related to those government

1 objectives and is not excessive. (*Salerno, supra*, 481 U.S. at p. 747; *Bell v. Wolfish* (1979)
2 441 U.S. 520, 538-539.) Section 28's application, as set forth above, is limited to serious
3 felony crimes where the victim suffers direct or threatened physical, psychological, or
4 financial harm, where the defendant poses a serious danger to victim or public safety, or
5 where the defendant poses a serious flight risk. While these categories of offenses may be
6 somewhat broader than those in section 12, they are still specific and more restrictive than
7 those upheld under the federal Bail Reform Act. (See *Salerno, supra*, 481 U.S. at pp. 747,
8 750 [which included, among others, "serious drug offenses" and "certain repeat
9 offenders."].) Accordingly, section 28 "carefully limits the circumstances under which
10 detention may be sought to the most serious crimes" and "narrowly focuses" on the
11 "overwhelming" interests of protecting safety and ensuring that a defendant appears in
12 court. (See *Salerno, supra*, 481 U.S. at pp. 747, 750.)

13 Section 28 further guides courts with enumerated factors to consider when deciding
14 whether detention is appropriate in an individual case, just as the Bail Reform Act does.
15 (18 U.S.C. § 3141, subd. (g); *Salerno, supra*, 481 U.S. at pp. 751-752; c.f. *Schall, supra*,
16 467 U.S. at p. 279.) These factors include the protection of the public, the safety of the
17 victim, the seriousness of the offense charged, the defendant's prior criminal record, and
18 the likelihood that the defendant will appear in court as required. (Cal. Const., art. I, § 28,
19 subd. (f)(3).) Section 12, however, limits these factors to fixing a bail amount, and they do
20 not serve as a guide in making detention decisions. (Cal. Const., art. I, § 12.) Section
21 1275, in conjunction with section 28, provides further guidance because section 1275
22 mandates that a court must consider any injury, threats made, or use of a deadly weapon in
23 assessing the seriousness of the crime. (Pen. Code § 1275, subd. (a)(2).)

24 Section 28, coupled with other constitutional and statutory provisions, also limits the
25 duration of a defendant's pretrial detention. (See *Salerno, supra*, 481 U.S. at p. 747; U.S.
26 Const., 6th Amend.; Cal. Const., art. I, § 15; Pen. Code § 859b; Pen. Code § 1382; see also
27 Cal. Const., art. I § 28, subd. (b)(9) [speedy trial fundamental right for victims].)
28 Furthermore, section 28, unlike section 12, requires courts to state the reasons for the

1 decision denying bail on the record, which provides an adequate record for appellate
2 review. (*Salerno, supra*, 481 U.S. at p. 752 [written statement of reasons]; Cal. Const., art.
3 I, § 28, subd. (f)(3), 4th par.; see also Pen. Code § 1270.1, subd. (d); Pen. Code § 1270.2.)

4 While section 28 states no burden of proof, the clear and convincing standard can
5 apply to section 28, which is the standard imposed by section 12. (See, e.g., *Santosky v.*
6 *Kramer* (1982) 455 U.S. 745, 756-757, 769 [clear and convincing evidence standard for
7 important rights]; *Addington v. Texas* (1979) 441 U.S. 418, 425-427, 433 [significant
8 deprivation of liberty requires clear and convincing standard]; Evid. Code § 160; see also
9 *Brosnahan, supra*, 32 Cal.3d at p. 262 [any reasonable doubts should be construed in favor
10 of constitutionality].)² Inherent in a finding of clear and convincing evidence, of course, is
11 the conclusion that no other means can protect public safety.

12 The People further note that “defendants are not entitled to trial-type evidentiary
13 standards at pre-trial detention hearings.” (*Reem v. Hennessy* (N.D. Cal. Mar. 12, 2018,
14 Case No. 17-cv-06628-CRB) 2018 U.S. Dist. LEXIS 40385, *8 (*Reem II*).)

15 A court may rely on proffers, and may require evidence to be produced only
16 selectively. However, due process requires courts to employ procedures that
meet minimum standards of reliability.

17 (*Reem II, supra*, 2018 U.S. Dist. LEXIS 40385 at p. *8 citing *United States v. LaFontaine*
18 (2d Cir. 2000) 210 F.3d 125, 131; see also *Salerno, supra*, 481 U.S. at p. 743; *United*
19 *States v. Winsor* (9th Cir. 1986) 785 F.2d 755, 756-757; *Portes, supra*, 786 F.2d at p. 767.)

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21 Date: June 10, 2019

Respectfully submitted,

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23 _____
24 Omid Talai
Assistant District Attorney

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26 _____
27 ² Federal courts, however, have concluded that decisions to detain based on flight risk are
28 subject to a preponderance of the evidence standard. (See, e.g., *United States v. Santos-*
Flores (9th Cir. 2015) 794 F.3d 1088, 1090 [detention order]; *United States v. Aitken* (9th
Cir. 1990) 898 F.2d 104, 107; *United States v. McConnell* (5th Cir. 1988) 842 F.2d 105,
110.)